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In the Supreme Court of the United States

OCTOBER TERM, 1959

EARNEST WILLIAM CARELOCK, JR. AND
HERBERT WILLIAM CARELOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 525

EARNEST WILLIAM CABBLER and
HERBERT WILLIAM CABBLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1970. The petition for a writ of certiorari, filed on August 10, 1970, is out of time under Rule 22(2) of the Rules of this Court; peti-

tioner subsequently filed a motion requesting an extension of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prohibition in the Gun Control Act of 1968 against possession of a firearm by a convicted felon is unconstitutional as an ex post facto law or as an infringement upon the right to bear arms or the privilege against self-incrimination.

2. Whether the seizure of a pistol from petitioner Earnest Cabbler was unlawful.

3. Whether Herbert Cabbler's asserted belief that he had not been convicted of a felony is a defense to his conviction for the false statement to that effect.

4. Whether the claim that two counts constituted one offense affects the conviction where the two counts were treated as one for sentencing.

STATUTES INVOLVED

The Gun Control Act of 1968, 82 Stat. 236, 18 U.S.C. (Supp. V) Appendix provides in pertinent part:

18 U.S.C. 1202(a):

> Any person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. (Supp. V) 922 (a)(6) provides in pertinent part:

> It shall be unlawful * * * for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. (Supp. V) 924 (a) provides:

> Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

STATEMENT

After trial without a jury in the United States District Court for the Western District of Virginia, petitioner Earnest W. Cabbler was found guilty of violating 18 U.S.C. App. (Supp. V) 1202(a)(1), by possessing a firearm after having been convicted of

a felony. He was sentenced to one year, with eight months suspended and three years probation.

After a separate trial in the same court, also without a jury, petitioner Herbert W. Cabbler[1] was convicted of making a false statement intended to deceive a licensed firearms dealer with respect to the purchase of a firearm in violation of 18 U.S.C. (Supp. V) 922(a)(6), and, on a second count, of making a false statement for the records of the seller in violation of 18 U.S.C. (Supp. V) 924(a). The two counts were consolidated for sentencing. Herbert was sentenced to one year, with six months suspended and three years probation.

The court of appeals consolidated the two cases on appeal and affirmed both convictions.

1. The stipulated facts at Earnest's trial show that on August 8, 1969, two patrolmen of the Roanoke Police Department observed him leaving a building with a firearm visibly protruding from his rear pocket. The officers knew Earnest was a convicted felon and when he reached a well-lighted parking lot near the building, they asked him to come to the patrol car, at which point he removed the firearm from his pocket and placed it under an automobile. One of the officers went directly to the automobile and retrieved the gun. The two officers then left without placing Earnest under arrest. Earnest had previously been convicted in the Hustings Court of the City of Roanoke of the felony of malicious bodily

[1] Petitioners are brothers and will be referred to by their first names throughout this brief.

injury with intent to maim, disfigure, disable and kill. (I.R. 23-24.)

2. Herbert purchased a .38 caliber pistol from a Roanoke pawnshop on March 17, 1969 (T. 3).[2] Although he had twice been convicted, in 1961 and 1962, of removing and concealing distilled spirits on which the tax had not been paid, and had served a one-year sentence after revocation of parole in 1962, Herbert told the salesman that he had not been convicted of a felony (T. 4). Prior to signing Form 4473, Herbert was given the opportunity to read it (T. 5-6). In pertinent part, the form stated:

> NOTICE TO TRANSFEREES. The following persons are prohibited from receiving a firearm in interstate or foreign commerce under 18 U.S.C., Chapter 44 of Title VII of Public Law 90-351, as amended (18 U.S.C., Appendix): * * * (2) persons under indictment for, or who have been convicted of, a crime punishable for a term exceeding 1 year; * * *.

The salesman also read this statement aloud to Herbert (T. 9).

Herbert, a high school graduate, testified that he operated a restaurant in a high crime district and bought the gun for protection (T. 18). Although he knew convicted felons were not permitted to purchase guns (T. 18), he thought his prior convictions were not for felonies because he had been so advised

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[2] The transcript of Herbert's trial, referred to herein by "T." followed by page number, is found in the envelope constituting p. 31 of Vol. II of the record filed in this Court.

by representatives of the People's Voter League during a registration drive in 1964 (T. 19-20).

ARGUMENT

1. While both petitioners attack the constitutional validity of the Gun Control Act of 1968, the issues thus raised are pertinent only to Earnest's case. Herbert was convicted of willfully making false statements under the Act and cannot defend on the basis that an unconstitutional statute evoked his fraudulent answers. *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77; *Dennis* v. *United States*, 384 U.S. 855; *Kay* v. *United States*, 303 U.S. 1.

Earnest contends the Act is an ex post facto law and therefore unconstitutional. But the Act is prospective only, proscribing activities that take place after its effective date, not before. Only if past criminal conduct is not a reasonable criterion for determining present fitness to possess a gun could this otherwise prospective statute be considered an ex post facto law. *Hawker* v. *New York*, 170 U.S. 189; see *Cases* v. *United States*, 131 F. 2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770, upholding the predecessor of the in-

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[1] The statute does not, in any event, infringe upon the privilege against self-incrimination. Furnishing the information required on the form does not compel the purchaser to incriminate himself; it merely precludes his purchase because of his prior felony. If the ban on possession by a felon is valid, as discussed in the text, then it is entirely reasonable to require a person purchasing a gun to state that he is not a felon.

stant statute against a similar contention.[4] The aim and effect would then be punishment not regulation.

In this regard Earnest further argues that conviction of a felony is not a rational basis for deeming a person unfit to possess a firearm. We point out, however, that Congress has not imposed an absolute ban; exceptions have been provided, and persons who show a legitimate need for firearms and fitness to possess them may obtain administrative relief under 18 U.S.C. (Supp. V) 925. See also 18 U.S.C. App. (Supp. V) 1203. As the Ninth Circuit recently held in *United States* v. *Thoresen*, Nos. 24,432, 24,433, decided June 8, 1970, this solves the classification problem in a "very practicable and reasonable manner." See also *United States* v. *Trioli*, 308 F. Supp. 358 (D. Mass); *United States* v. *Wiley*, 309 F. Supp. 141 (D. Minn). Congress made rational findings supporting the general prohibition—as any regulatory legislation requires—and the exceptions adequately provide for any overinclusions.

Earnest also argues that the language of Section 1202(a)(1), punishing a felon who "receives, possesses, or transports in commerce or affecting commerce" a gun, should be interpreted to require allegation and proof by the government that his firearm was "in commerce or affecting commerce" at the moment he was found in possession. However, the pur-

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[4] See also *Smith* v. *United States*, 312 F. 2d 119 (C.A. 10); *United States* v. *Biancofiori*, 422 F. 2d 584 (C.A. 7), certiorari denied, 398 U.S. 942; *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.

pose of the Act, together with its legislative history, clearly show the intention to mitigate identified evils by forbidding possession of firearms to specified classes of specially risky people, regardless of whether the possession itself occurred "in commerce or affecting commerce," a factor that in no wise diminishes the danger. *United States* v. *Bass*, 308 F. Supp. 1385 (S.D. N.Y.), recently followed in *United States* v. *Daniels*, No. 25,297 C.A. 9, decided September 8, 1970.

As to the claim that the Act exceeds congressional powers, "[t]here is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce." *United States* v. *Bass*, *supra*, 308 F. Supp. at 1388, citing cases; accord, *United States* v. *Wiley*, *supra*, 309 F. Supp. at 143-144. Congress was entitled to view the number of crimes involving firearms as creating a burden on commerce. Moreover, in light of recent tragedies Congress had ample basis for its findings that the prohibited conduct constitutes a threat to the safety of the President and Vice President of the United States, an impediment or threat to the exercise of free speech and free exercise of religion, and a threat to the continued and effective operation of the government of the United States and the state governments. 18 U.S.C. App. (Supp. V) 1201.

There is nothing to the claim that regulation of firearms violates the Second Amendment. That amendment provides "A well regulated militia, be-

ing necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Precluding a convicted felon from possessing a gun does not impair the efficiency of a well-regulated militia. See *United States* v. *Miller*, 307 U.S. 174; *Cases* v. *United States*, 131 F. 2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770; *United States* v. *Tot*, 131 F. 2d 261 (C.A. 3), reversed on other grounds, 319 U.S. 463.

2. Earnest asserts that the pistol that was the basis of his prosecution was the product of an illegal search and seizure because Virginia law prohibits searches without a warrant under any circumstances. The Virginia courts have not so interpreted the statute,[5] and, in any event, the officers did not violate the Fourth Amendment. The gun was in plain view and the officers observed it from the street, where they had a right to be. A search therefore did not take place. And there can be no question that the seizure was valid. Earnest was known to be a convicted felon and the gun was an instrumentality of a felony[6] which the officers observed being committed. Neither the Fourth Amendment nor the law of Virginia prohibits seizing the weapon in these circumstances.

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[5] In *Carter* v. *Commonwealth*, 209 Va. 317, certiorari denied, 394 U.S. 991, the Virginia Supreme Court of Appeals explained that the Virginia Code Section 19.1-88 affords the same protection as that granted by the Fourth Amendment and forbids only unreasonable searches without a warrant.

[6] That is, possession of a firearm by a convicted felon.

3. Herbert argues that the court improperly disallowed his defense that the Voter League misled him into thinking he had not been convicted of a "felony." But the statute, 18 U.S.C. (Supp. V) 922(h)(1); and the form, Internal Revenue Service Form 4473, which was read to him, speak not in terms of "felonies," a word with a somewhat technical meaning, but rather of "persons under indictment for, or who have been convicted of, a crime punishable for a term exceeding 1 year." Herbert had been twice convicted of violating 26 U.S.C. 5601(a)(12), a crime punishable by imprisonment for not more than 5 years, and at the least he was on notice of this. In this situation the trial judge was obviously correct in refusing to excuse Earnest's false statement on the theory he proposes.[7]

4. Herbert also contends that the indictment here creates two offenses for the same act of falsely stating that he had not been convicted of a felony and therefore violates the Fifth Amendment's prohibition against double jeopardy. Whatever the merits of this contention in a case such as this where there has been only a single prosecution for crimes arising out of the same occurrence, cf. *Ashe* v. *Swenson*, 397

[7] In *United States* v. *Hedgecoe*, 420 F. 2d 458 (C.A. 4), on which Herbert principally relies, the defendant signed form 4473 without reading the Notice to Transferees, and there was no other evidence that the defendant acted with the requisite knowledge. Also, the reversal in *Hedgecoe* was based on a faulty arraignment and guilty plea under Rule 11, F.R.Crim.P. Here, Petitioner had the opportunity to read and had read to him the "punishable for a term exceeding 1 year" language.

U.S. 436, the issue is not presented here for the obvious reason that the two counts were consolidated for sentencing and the one year sentence (six months in jail, six months suspended, three years probation) was well within the maximum $5,000 fine and five year prison sentence that could have been imposed for any one violation of 18 U.S.C. (Supp. V) 924.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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